SINCERE LEASING SDN BHD

v.

KETUA PENGARAH HASIL DALAM NEGERI

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-01-8-98]
22 FEBRUARY 2000

REVENUE LAW: *Income Tax - Case stated - Appeal to High Court from decision of Special Commissioners - Procedure to be followed - Facts to be included in case stated - Income Tax Act 1967, sch. 5 para. 34*

The issue for determination was the procedure to be followed when the special commissioners of income tax ('the special commissioners') state a case to the High Court under para. 34 of sch. 5 of the Income Tax Act 1967 ('the Act').

Before the special commissioners, the main issue was the method of calculating the income of the appellant. The appellant contended that only the interest earned on its leasing activities was income, as was the industry accounting practice. The respondent contended that both principal and income constituted gross income and were taxable. The special commissioners accepted the respondent's argument.

In appealing the decision, the appellant filed a notice requiring the special commissioners to transmit the matter to the High Court by way of a case stated, and this was done.

The appellant was dissatisfied with the way the case was stated and before the matter was heard, applied to have it remitted to the special commissioners to comply with the Federal Court's direction in *E v. Comptroller General of Inland Revenue* [1970] ("*E's* case") or alternatively, to state a supplementary case containing the parties' contentions, evidence and the special commissioners' findings, to rectify the omissions in the preparation of the case.

The High Court rejected the application on the ground that any defects in the case stated could be cured by the High Court under para. 40 of sch. 5 of the Act. The appellant appealed.

Held:
Per Siti Norma Yaakob JCA:

[1] *E's* case established that the parties to a case stated should be allowed to see the draft case and make amendments and suggestions before it is submitted to the High Court.

[2] Once the court was satisfied that there was non-compliance with the direction of the Federal Court in *E's* case, it should have ordered a remission immediately without considering the effects of the omissions.

[3] The case stated failed to state the special commissioners' specific findings of fact as to the accounting methods used by the parties and the leasing industry. This was important to enable the High Court to ascertain the real question of law sought to be determined.

[4] Although the right to order a remission was a question of discretion for the judge, in this case, that discretion had not been exercised judicially. The case stated therefore had to be remitted to the special commissioners for primary findings of fact as to the accounting methods of the appellant and the leasing industry, and for adherence to the direction in *E's* case.

[Appeal allowed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Isu untuk diputuskan adalah mengenai kaedah yang patut diikut apabila pesuruhjaya khas cukai pendapatan ('pesuruhjaya khas') mengemukakan kes ke Mahkamah Tinggi dibawah perenggan 34 Jadual 5 Akta Cukai Pendapatan 1967 ('Akta tersebut').

Dihadapan pesuruhjaya khas, isu yang utama ialah cara-cara mengira pendapatan perayu. Perayu mendakwa bahawa hanya faedah yang diperolehi dari aktiviti-aktiviti pajakan merupakan pendapatan, sebagaimana di dalam amalan perakaunan. Responden mendakwa bahawa kedua-dua wang pokok dan pendapatan adalah pendapatan kasar dan boleh dikenakan cukai. Pesuruhjaya khas menerima hujahan responden.

Semasa membuat rayuan terhadap keputusan tersebut, perayu telah memfailkan satu notis yang memohon pesuruhjaya khas untuk memindahkan perkara ini ke Mahkamah Tinggi dengan cara penyataan kes (*by way of case stated*) dan ianya dilakukan.

Perayu tidak berpuas hati dengan cara kes dinyatakan dan sebelum perkara ini didengar, memohon agar perkara ini dihantarsemula ke pesuruhjaya khas sebagaimana menurut arahan Mahkamah Agung di dalam kes *E v Comptroller General of Inland Revenue* ('kes E') atau secara alternatif, untuk menyatakan satu kes tambahan mengandungi dakwaan-dakwaan pihak-pihak, keterangan dan keputusan pesuruhjaya, untuk membaiki peninggalan dalam penyediaan kes tersebut.

Mahkamah Tinggi menolak permohonan tersebut atas alasan bahawa sebarang ketidaksempurnaan di dalam kes yang dinyatakan dapat diatasi oleh Mahkamah Tinggi dibawah perenggan 40 Jadual 5 Akta tersebut. Perayu merayu.

Diputuskan:
Oleh Siti Norma Yaakob HMR:

[1] Kes E memantapkan bahawa pihak-pihak kepada kes yang dinyatakan hendaklah dibenar untuk melihat draf kes dan membuat pindaan-pindaan dan cadangan-cadangan sebelum ianya diserahkan ke Mahkamah Tinggi.

[2] Persoalannya ialah sama ada terdapat pematuhan arahan amalan. Setelah mahkamah berpuashati terdapat ketidakpatuhan, ia wajar memerintahkan agar penghantaran semula dibuat dengan segera tanpa mengira kesan-kesan peninggalan.

[3] Kes dinyatakan gagal untuk menyatakan keputusan fakta pesuruhjaya khas berkenaan dengan kaedah perakaunan yang dipakai oleh pihak-pihak dan industri pajakan. Ini penting bagi membolehkan Mahkamah Tinggi mempastikan persoalan undang-undang yang sebenarnya yang perlu diputuskan.

[4] Walaupun hak untuk membuat satu perintah penghantaran semula adalah atas budibicara hakim, dalam kes ini, budibicara tersebut tidak digunakan. Oleh yang demikian kes yang dinyatakan ini terpaksa dihantarsemula ke pesuruhjaya khas untuk keputusan primer fakta berkenaan kaedah perakaunan perayu dan industri pajakan, dan bagi mematuhi arahan amalan kes E.

[Rayuan dibenarkan dengan kos.]

Case(s) referred to:
Chua Lip Kong v. D-G of Inland Revenue [1982] 1 MLJ 235 ***(foll)***
Consolidated Goldfields plc v. Inland Revenue Commissioners [1990] STC 357 ***(refd)***
E v. Comptroller General of Inland Revenue [1970] 2 MLJ 117 ***(foll)***

Legislation referred to:
Income Tax Act 1967, s. 33(1), sch. 5 paras. 34, 40
Income Tax Leasing Regulations 1986, reg. 2

For the appellant - Dr Cyrus Das (Dr Arjunan Subramaniam & John Matthew with him); M/s Shook Lin & Bok
For the respondent - Abu Tariq Jamaluddin SFC

[Appeal from High Court, Kuala Lumpur; Tax Appeal No: R3-14-5-97]

Reported by Anne Khoo

JUDGMENT

Siti Norma Yaakob JCA:

This income tax appeal is not about the liability of a taxpayer but is more concerned with the procedure to be followed when the Special Commissioners of Income Tax ("the Special Commissioners") decide to transmit a case to the High Court by way of a case stated under para. 34 of sch. 5 to the Income Tax Act 1967 ("the Act").

Before the Special Commissioners, the appellant had appealed against the 1986-1988 assessments raised by the respondent and at the hearing, the main issue for determination was whether, the method adopted by the respondent in the apportionment of common expenses on fixed assets attributable to the appellant's leasing and non-leasing business, was correct.

Tax is calculated on the adjusted income of a taxpayer. To ascertain the adjusted income, all outgoings and expenses incurred wholly and exclusively in the production of the gross income will have to be deducted from the gross income. See s. 33(1) of the Act. However by virtue of reg. 2 of the Income Tax Leasing Regulations 1986, income from leasing and non-leasing activities are to be treated separately and distinct from each other and as such the common expenses of one business cannot be set off against the other. It is a simple matter where the expenses are identifiable as being attributable to one or the other activity. Problems do arise when the expenses are common to both activities and in such situations, the common expenses are apportioned between the two activities before they can be deducted from the gross income in order to arrive at the adjusted income. It was the method of apportionment that was the issue before the Special Commissioners with the appellant contending that the respondent's method was wrong and erroneous whilst theirs was right and proper.

The Act does not make any provision as to the method of apportionment but all parties agree that the formula to be used is:

$$\frac{\text{Income of leasing activities}}{\text{Income of leasing activities} + \text{Income of non-leasing activities}} \times \text{Common expenses}$$

But that is as far as the agreement goes as the appellant contend that for the income of their leasing activities only interest can be taken into account and this is in line with the accounting practice where only the interest element of leasing and non-leasing activities is considered as income. The respondent on the other hand maintains that the income of the leasing activities is made up of the gross income *ie*, principal and interest and clearly the crux of the dispute relates to the composition of the income in the leasing business.

The Special Commissioners accepted the method adopted by the respondent to be correctly made and in line with the provisions of the Act. They accordingly dismissed the appellant's appeal and confirmed the respondent's assessments for the years 1986-1988.

It was to appeal against that deciding order that a notice was filed by the appellant requiring the Special Commissioners to state a case for the opinion of the High Court. That was done but before the High Court could hear the matter on its merits, the appellant filed a notice of motion pursuant to para. 40 of schedule 5 to the Act, seeking an order to have the case stated remitted to the Special Commissioners:

(1) to be redrafted to comply with the direction of the Federal Court in *E. v. Comptroller General of Inland Revenue* [1970] 2 MLJ 117 (*E's* case) or

(2) alternatively, to state a supplementary case to contain

(i) the contentions made by the parties,

(ii) the evidence as led by the parties and

(iii) the findings of the Special Commissioners on the evidence so led.

Clearly the notice of motion was intended to rectify the omissions in the preparation and submission of the case stated. However it was rejected by the High Court on the ground that there was no justification for such a remission as all the omissions complained of are apparent on the face of the case stated. It was to appeal against the dismissal of the notice of motion that the parties were before us.

The first objection taken by the appellant was that the time-honoured practice as directed by the Federal Court in *E's* case *(supra)* had not been followed by the Special Commissioners. That practice which had been in force since 1976 lays down the procedure and practice as to how a case stated is to be submitted to the High Court. The direction to adopt that practice became necessary as sch. 5 to the Act which is titled "appeals" makes no provision as to the proper procedure to be followed. In so doing, the Federal Court at p. 120 of the report had this to say:

> ... this court should give some indication as to the practice which should be followed in the future. It is clear that the law relating to such appeals is similar to the law in England in relation to similar appeals as contained in section 64 of the Income Tax Act, 1952 and the earlier Acts. Reference to the practice followed in England is made in the following passage in the judgment of Collins M.R. in *Manchester Corporation v. Sugden* [1903] 2 KB 171, 173.:
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> > There can be no doubt whatever that, under the modern practice at all events (and it seems to me to be a very convenient practice), the parties interested in the case are allowed or invited to see the case in its proposed form, and are then allowed or invited to make suggestions and amendments upon it. It seems to me that it is very desirable that this should be done, because cases of this kind are usually complicated and often involve large sums of money; and if a case when stated does not come in the final form to a hearing on the real points which the parties desire to try, the only alternative is that the Court has to send it back again, and that involves a good deal of expense.
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> ...
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> I believe it is well within the province of this court to direct that that practice should be followed, and I would make a direction accordingly. It is an admirable practice and, if followed, there will seldom arise the necessity for a court to order the case to be remitted to the commissioners in order to put right the case stated.

In the instant appeal, the practice of forwarding a draft of the proposed case stated to the appellant and the respondent for their comments and settling it before submitting it to the High Court was not done by the Special Commissioners and the justification for this omission is expressed by the High Court in the following manner:

> In this case, the gist of the practice direction had been complied with in that the contents of the case stated were set out in accordance with the approved practice. Thus, mere failure to send the case stated to the parties for their comments before forwarding it to the High Court, to my mind, was not fatal, and such failure would not render the case stated defective and the

> proceeding before the High Court invalid. Whatever defects in the case stated, if there is any, could always be cured by the High Court by virtue of its power under paragraph 40 of Schedule 5 of the Act.

We do not consider that it was right and proper for the High Court to offer an explanation for the omission. The question to be asked was whether there had been compliance or non-compliance with the practice direction. Once the court was satisfied that there had been non-compliance, it should have ordered remission straightaway and not consider the effects of the omission. To do so is to question the wisdom of the Federal Court to set the precedent and that we say is not the function of the High Court. It must be remembered that the practice direction was not issued by an official as part of his administrative duties, but that it formed part of a judgment by the highest judicial tribunal in the country. As such, the Federal Court had given all due consideration to the practice of having a proposed case commented and approved by the parties before the final settlement for submission to the High Court so that all matters in dispute are clearly and precisely stated for determination and incidence of remission after that, will not be made necessary. It was to prevent the case being shuttled to and fro and minimise the incidence of delay that the Federal Court decided to adopt the practice direction and to say that such an omission can be cured under para. 40 to sch. 5 of the Act, is to do the very thing that the practice direction seeks to prevent.

The other reason given by the appellant why the case should be sent back was that it is incomplete as the Special Commissioners had failed to make a finding of fact as to what was the accounting method adopted by the appellant and what was the accounting method in the leasing industry.

The omission complained of, brings to mind what should appear in the case stated. That same question was asked and answered by the Privy Council in *Chua Lip Kong v. Director-General of Inland Revenue* [1982] 1 MLJ 235 at p. 236 in the following manner:

> Their Lordships cannot stress too strongly how important it is that, in every Case Stated for the opinion of the High Court, the Special Commissioners should state clearly and explicitly what are the findings of fact upon which their decision is based and not the evidence upon which those findings, so far as they consist of primary facts, are founded. Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself; occasionally they may be insufficient to enable the High Court to decide the question of law sought to be raised by the Case Stated, but in that event it will be necessary for the Case to be remitted to the Commissioners themselves for further findings. It is the primary facts so found by the Commissioners that they should set out in the Case Stated as having been "admitted or proved".

It must be remembered that in apportioning the common expenses for their leasing and non-leasing activities, the appellant had included only interest as part of their income in line with the accounting practice in the leasing industry where only the interest element is considered.

Under para. 6 of the case stated, the Special Commissioners had, at sub-para. (a) set out all the facts admitted and at sub-para. (b) all the facts proved. But there is no specific finding of fact as to the accounting method used by the appellant nor the one used in the leasing industry, although they had in passing made references to them. But reference alone is not sufficient. There must be primary findings of fact made in the accounting systems adopted by the appellant and the one currently in use in the industry. Findings of fact are very important in a case stated as the notes of evidence taken by the Special Commissioners are never submitted to the High Court. It is for this reason that there is a need to make a finding on the matter of the accounting systems relied upon by the appellant and currently in use in the leasing industry and to clearly state so, to enable the High Court to ascertain the real question of law sought to be raised. Guidelines on this matter were enunciated in the case of *Consolidated Goldfields plc v. Inland Revenue Commissioners* [1990] STC 357 where at p. 361 it was held as follows:

> (1) The findings of fact are for the commissioners. They cannot be instructed to find facts, nor as to the manner in which they express their findings.
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> (2) The parties are entitled to expect that the commissioners will in the case stated make findings covering the matters which are relevant to the arguments adduced or intended to be adduced on appeal.
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> (3) If a request is made for a case stated to be remitted for additional findings to be made or to be considered, the applicant must, in my opinion, show that the desired findings are (a) material to some tenable argument, (b) at least resonably open on the evidence that has been adduced, and (c) not inconsistent with the finding or findings that have already been made.

In this instance, the accounting systems are matters of relevance as they are intended to be argued before the High Court. The Special Commissioners had preferred the respondent's apportionment which as alleged by the appellant runs contrary to the prescribed and established accounting method. This makes it all the more desirable that the Special Commissioners state their findings of fact so as to enable the High Court to identify the real question of law sought to be determined.

For the omissions that have been complained of, we consider that it is only right and proper that such omissions be rectified. Although we are mindful that the right to refuse or order a remission is very much an exercise of a discretion by the court below, in the circumstances of this appeal, we consider that the discretion had not been exercised judicially. On that basis and for reasons appearing in this judgment we had allowed this appeal with costs here and below and directed that the case stated be remitted to the Special Commissioners to enable them:

(1) to make a primary finding of fact as to the accounting method as adopted by the appellant,

(2) to make a primary finding of fact on the accounting system as prescribed and practised in the leasing industry and

(3) to adhere to the practice direction as set out in *E's* case *(supra).*

We also ordered the deposit to be refunded to the appellant.